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No. 08-119

In The
Supreme Court of the United States

ROGER DALE LEWIS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether evidence has been "suppressed" under *Brady v. Maryland*[1] where the evidence the government has been charged with failing to disclose was available in a public record that the defendant had every reason to review.

[1] 373 U.S. 83 (1963).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING REVIEW	8
I. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT	8
II. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS	11
A. The Fourth Circuit	12
B. The Fifth Circuit	15
C. The Ninth Circuit	18
D. The Tenth Circuit	20
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES

Banks v. Dretke, 540 U.S. 668 (2004).....9, 10, 11

Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995).....21

Bell v. Bell, 512 F.3d 223 (6th Cir. 2008).....8, 22

Brady v. Maryland, 373 U.S. 83 (1963).....*passim*

Gantt v. Roe, 389 F.3d 908 (9th Cir. 2004).....18, 19

Johnson v. Dretke, 394 F.3d 332 (5th Cir. 2004).....15, 16, 17

Johnson v. Dretke, 442 F.3d 901 (5th Cir. 2006).....17

Sanders v. Johnson, 191 Fed.Appx. 240 (4th Cir. 2006).....14

Scott v. Mullin, 303 F.3d 1222 (10th Cir. 2002).....21, 22

State v. Roger Lewis, 1995 WL 10510 (Tenn. Crim. App. Jan. 12, 1995).....4

Strickler v. Greene, 527 U.S. 263 (1999).....9, 10, 11

United States v. Hernandez-Muniz, 170 F.3d 1007 (10th Cir. 1999).....22

United States v. Infante, 404 F.3d 376 (5th Cir. 2005).....17

United States v. Quintanilla, 193 F.3d 1139 (10th Cir. 1999).....20, 21

United States v. Valles-Zamora, 252 Fed.Appx. 701 (5th Cir. 2007).....17

TABLE OF AUTHORITIES – Continued

Page

United States v. Wilson, 901 F.2d 378 (4th Cir. 1990) 12, 13, 14

Walker v. Kelly, 195 Fed.Appx. 169 (4th Cir. 2006) 13, 14

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2244(b)(2)(B)(i) 16

28 U.S.C. § 2244(d)(1)(D) 16

OPINION BELOW

The March 14, 2008, opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed the district court judgment denying habeas relief, is unreported. (Pet.App. 1a) The order and memorandum opinion of the district court denying the petition for a writ of habeas corpus are unreported. (Pet.App. 69a, 71a)

STATEMENT OF JURISDICTION

The judgment and opinion of the Court of Appeals were entered on March 14, 2008. (Pet.App. 1a) By order entered on June 2, 2008, Justice Stevens extended the time for filing a petition for writ of certiorari until July 28, 2008. (Pet.App. 110a) Petitioner filed a certiorari petition on July 28, 2008. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petitioner was convicted in 1993 of five counts of arson and was sentenced to an effective term of thirty years. On direct review, the Tennessee Supreme Court held that the five acts of arson constituted a single offense and remanded the case for resentencing based upon a single count of arson. On remand, the petitioner was sentenced to twenty-one years. The opinion of the Tennessee Court of Criminal

Appeals on the petitioner's direct appeal summarizes the evidence presented at trial:

> In May 1992, appellant Lewis was asked to move out of his apartment because he had not paid the rent. He threatened retaliation against the landlord. On June 5, 1992, the Cheryl Apartments, located in Hendersonville, Tennessee, burned in an arson fire.
>
> Lewis had been in his apartment on June 4, 1992, in the process of moving items out of the dwelling. On June 5, at about 3:00 a.m., Lewis was in the vicinity of the apartment. At about 3:15 a.m. the residents of the apartment directly below Lewis' apartment heard "stomping noises" emanating from upstairs. Shortly after that, one of the residents saw Lewis' car being driven away from the apartment complex. The fire alarm sounded and the fire department arrived at the complex at 3:36 a.m. Although all of the tenants were evacuated safely, there was extensive damage, and the entire top of the Cheryl Apartments was engulfed in flames. Five apartments were destroyed.
>
> The evidence showed that Lewis returned to his new residence at about 4:00 a.m. on June 5, 1992, and made two telephone calls to two different nurses who apparently were working late on their shifts. One of the nurses thought that it was odd that Lewis mentioned gasoline several times during the conversation.

After an investigation, the fire marshal determined that an accelerant was used to start the fire. The fire began in the living room of Lewis' apartment in the floor area. The electricity had been disconnected in the apartment, and there was no wiring in the area where the fire started. The fire was not an accident, but the investigators could not positively determine the type of accelerant that was used.

During the investigation which lasted for several months, Lewis was interviewed and reinterviewed by the fire marshal or other authorities. Lewis made several inconsistent statements about where he had been on the night in question. Some of his alibi witnesses, particularly the nurses, did not corroborate his time frame of reference so as to eliminate him as a suspect. Lewis claimed that he had lost many items in the fire in his apartment when in fact he had not. In October 1992, authorities searched Lewis' new residence and discovered many items such as coins, cookware, and electronic equipment which he had claimed were lost in the fire. Additionally, a plastic jug was seized from Lewis' car during the investigation. A forensic scientist tested the jug and concluded that it had contained gasoline.

One of the prosecution's witnesses, Ernest Bishop, testified that he was in the Sumner County Jail and was Lewis' cell mate. Bishop testified that he heard Lewis say that he had moved some of his possessions out of his

> apartment, picked up a gallon jug of gasoline, poured gasoline in the ceiling, and then lit his lighter which started the fire. According to the prosecution's theory, however, Lewis had planned to leave the gasoline in the ceiling so that when the electricity was reconnected, a fire would start when someone turned on the lights. Apparently Lewis made a stupid, and potentially deadly, mistake. When he flicked his lighter so that he could see the way out of the apartment, the gas that he had spilled on the floor caught fire.
>
> A detective interviewed Lewis and pointed out that the time frames for his alibi did not coincide. During one of the conversations, according to the detective, "the defendant became very emotional to the point of crying and told me that the evidence was so great that he might as well plead guilty." Apparently Lewis repeated this to the detective several times during the course of the interview.
>
> . . . At his sentencing hearing, the evidence showed that several people, including small children, were sleeping in the apartments when Lewis started the fire. Many people lost all they had in the flames.

State v. Roger Lewis, 1995 WL 10510 (Tenn. Crim. App. Jan. 12, 1995) (app. granted Nov. 12, 1996).

Prior to trial, the petitioner's counsel submitted a discovery request for

> any and all evidence in possession of the State or in possession of any governmental agency that might be termed favorable, whether the evidence be entirely exculpatory in nature or tending to reduce the degree of the offense or punishment, or whether the evidence might be favorably used by the defendant to impeach the credibility of any witness the government intends to call in this matter.

The request then specified certain types of material that should be included under the request, such as agreements between witnesses and the government regarding testimony related to the proceedings against the petitioner, evidence of any preferential treatment or benefit given to a witness in return for the testimony, prior statements of witnesses, names of witnesses who might be favorable to the petitioner, and information regarding the mental condition of any witness that might raise a question regarding the credibility of that witness. (C.A.J.App. 266-268)

At trial, Ernest Bishop testified that the petitioner had divulged to him particular details of his setting his apartment afire. During cross-examination, petitioner's counsel attacked Bishop's credibility by asking, "Mr. Bishop, how many other times have you been convicted of a felony?" and "Well, why don't you tell the jury some of the convictions that you have had for felonies and tell us a few things you've done?" He also asked, "Are you presently waiting to be extradited to Texas?" to which Bishop responded affirmatively. When counsel asked what

charge the extradition was for, Bishop responded that it was for a charge of sexual assault. (C.A.J.App. 94-95)

After the conclusion of petitioner's direct appeal, he sought post-conviction relief and first raised his claim that the State had a duty to divulge the report of his criminal history under *Brady v. Maryland*, 373 U.S. 83 (1963). During the hearing on the petition for post-conviction relief, the petitioner's trial attorney testified regarding his attempts to impeach Bishop during cross-examination. He acknowledged that he did not investigate the background of Bishop and that he made no attempt to obtain Bishop's criminal history through the National Crime Information Center (NCIC). He testified that he "could have gotten an NCIC report," but he chose not to do so. (C.A.J.App. 145-146) He explained:

> A. After looking at and listening to what he said and looking like he did, I felt I could discredit the testimony enough for the jury. All an NCIC report would have told me was how many convictions this guy had. I asked him about convictions. He lied about it. No question about it, it would have gone to the credibility of his testimony.
>
> Q. Wouldn't it show that he had various convictions pending in several other jurisdictions?
>
> A. Sure.

> Q. But in your voir dire of him, you didn't ask him about those other convictions?
>
> A. I voir dired him basically about whether he had been offered anything for his testimony.
>
> I think we had another guy come in who was going to testify. I remember we had a witness who was going to try to testify this guy couldn't have heard these things. I don't remember the guy's name, but we did bring him into court, and he testified to those things, that Bishop could not have heard the things he said.
>
> They got this information that Mr. Lewis had laid his search warrant down. All the information contained in there, that would have been very easy for Mr. Bishop to have gotten this and read it. It was brought out to the jury.

(C.A.J.App. 146-147)

After the state court denied post-conviction relief and the Court of Criminal Appeals affirmed, the petitioner sought federal habeas corpus relief in the United States District Court for the Middle District of Tennessee. Regarding the *Brady* claim, the District Court denied relief but granted a certificate of appealability.

The United States Court of Appeals for the Sixth Circuit reviewed the *Brady* claim in light of that

Court's recent decision in *Bell v. Bell*, 512 F.3d 223 (6th Cir. 2008) (en banc) (Pet.App. 9a):

> [In *Bell*,] we held that the state's failure to turn over the sentencing records of a government witness was not a *Brady* violation because those records were publicly available and the petitioner could have obtained them. [*Bell v. Bell,* 512 F.3d] at 235. As was the case in *Bell*, Bishop's testimony derived from evidence he acquired while in prison with Petitioner, and Bishop further acknowledged on cross-examination that he was subject to extradition to Texas. Petitioner therefore "easily could have pursued any pending charges against [Bishop] and their disposition." *Id.* Thus, because the factual basis for Petitioner's claim was easily available from another source, the government was under no duty to supply that information to Petitioner. *See id.* (and citations therein).

(Pet.App. 5a)

The petitioner now seeks this Court's review.

REASONS FOR DENYING REVIEW

I. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

The petitioner argues that the decision of the Sixth Circuit, that the government does not violate the *Brady* rule when it fails to disclose favorable

information that is publicly available, conflicts with this Court's decision in *Brady* itself and with this Court's decisions in *Strickler v. Greene*, 527 U.S. 263, 266, 276, 289 (1999), and *Banks v. Dretke*, 540 U.S. 668, 695 (2004). However, the petitioner's argument is misplaced.

In *Brady v. Maryland*, 373 U.S. 83 (1963), Brady and a co-defendant were charged with first-degree murder. Brady admitted his involvement in the crime, but claimed that the co-defendant did the actual killing and pleaded with the court to spare his life. The state had in its possession a statement by the co-defendant in which the co-defendant admitted the actual homicide, but the state never divulged that information to Brady or his counsel. In *Brady*, this Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* 373 U.S. at 87. *Brady* clearly established the duty of the state to provide exculpatory evidence to a criminal defendant, but did not establish a duty on the state to do for the defendant what the defendant could easily do for himself.

In *Strickler*, Strickler was charged with capital murder and related crimes. At trial, a witness gave detailed eyewitness testimony about the crimes and Strickler's role as one of the perpetrators. However, the prosecutor failed to disclose exculpatory materials in the police files, consisting of notes taken by a

detective during interviews with the witness and letters written by the witness to the detective, that cast serious doubt on significant portions of her testimony. While this Court reiterated that the prosecution has a duty to disclose favorable evidence to a defendant – both exculpatory evidence and impeachment evidence – even when such evidence has not been specifically requested, the evidence withheld from the defendant was within the exclusive control of the state. Unlike the information at issue here, there was no other source for the evidence in *Strickler*. Regardless of whatever efforts the defendant might have exerted, he was dependent on the state for the discovery of critical exculpatory evidence. Therefore, the decision in *Strickler* does not conflict with the decision in this case.

Likewise, in *Banks v. Dretke*, it was learned after Banks' conviction for first-degree premeditated murder that the state had withheld evidence that would have allowed Banks to discredit two essential prosecution witnesses. But again, the evidence was in the exclusive control of the state. The decision in *Banks* thus did not impose a duty on the state to provide evidence otherwise available to the defendant in a public record.

In both *Strickler* and *Banks*, the defendants had no reason to know about the evidence that had been withheld. Here, however, not only were the criminal history records available to the petitioner, but the status of the witness as a detainee at the jail indicated that charges were pending against the witness

and that prior convictions were likely to exist. Petitioner's counsel affirmed his knowledge that Ernest Bishop had a criminal history when he cross-examined Bishop regarding prior convictions and a pending extradition to Texas for a charge of sexual assault. Counsel admitted that he could have obtained an NCIC report of Bishop's criminal history, but chose not to do so.[2]

While *Strickler* and *Banks* stand for the proposition that the state has a duty to divulge exculpatory and impeachment evidence where such evidence resides in the sole custody and control of the government, neither case imposes a duty on the state to search public records for the benefit of a defendant – particularly when the defendant has demonstrated knowledge that such records exist and are available.

II. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

The petitioner suggests that there exists "an entrenched circuit split" of authority on the question presented in this case and that this is another reason for the Court to review the Sixth Circuit decision. But

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[2] Petitioner's knowledge of and affirmative decision not to obtain the criminal history information of the witness in this case further distinguishes it from both *Strickler* and *Banks*, where this Court relied on the defendant's reasonable reliance on representations made by the state in not pursuing the evidence in question.

the petitioner severely overstates the variance of opinion among the circuits and fails properly to identify the issue upon which the circuits might actually disagree.

A. The Fourth Circuit

In the Fourth Circuit, the prevailing authority on this issue is *United States v. Wilson,* 901 F.2d 378 (4th Cir. 1990), where the Court clearly held that "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *Id.* at 381.[3] Nevertheless, proclaiming that the Fourth

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[3] In *Wilson*, the defendant complained that the state failed to divulge affidavits of the live-in girlfriend of a CIA official who, according to the witness, intended to "set up" the defendant by framing him for an arms exportation conviction. The Court denied relief and explained:

> Although we recognize that any statements [the witness] may have made suggestive of a set-up could have helped Wilson's case, we find no *Brady* violation because Wilson was free to question [the witness] in preparation for trial. Indeed, given Wilson's awareness of [the witness's] closeness to [the CIA official] and given Wilson's belief that he was framed, it would have been natural for Wilson to have interviewed [the witness] in preparation for trial to determine if [the witness] could have supplied Wilson with exculpatory evidence. In situations such as this, where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable

(Continued on following page)

Circuit has adopted a position contrary to both *Wilson* and the Sixth Circuit's holding in the current case, the petitioner refers to the unpublished decision in *Walker v. Kelly*, 195 Fed.Appx. 169 (4th Cir. 2006). In *Walker*, the state failed to provide the defendant copies of police reports indicating, contrary to her trial testimony, that an eyewitness did not actually see the defendant on the night of the murder. Specifically, two police reports indicated that a witness recognized the voice of an intruder who shot and killed two persons. But in both reports, the identification was limited to the shooter's voice. Further, in an affidavit by the reporting detective, he stated that the witness recognized the murderer's voice but was unable to visually identify him. None of these documents were provided to the defendant, but the state did provide an autopsy report which stated that unnamed "witnesses inside the home heard the shots but *did not witness the shooting*" and a pre-sentence report stating that the witness "*fled into the bathroom. . . . It was at that time, she heard three shots fired.*" *See id.* 195 Fed.Appx. at 173-174 (emphasis in original). The Fourth Circuit held that

> the availability of the autopsy and pre-sentence reports [did] not satisfy the prosecutor's duty to disclose the other *Brady* material to Walker. The withheld reports

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defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine.

United States v. Wilson, 901 F.2d at 381.

> provide persuasive evidence that [the witness] did not see the shooter the night of the murder, whereas the files that were available earlier suggest only that [the witness] did not witness the shooting. As such, the withheld documents would have provided substantial evidence impeaching [the witness's] trial testimony that she saw the person who shot her father.

Id. 195 Fed.Appx. at 174.

In stark contrast to the evidence at issue here, the police reports and affidavit that should have been disclosed by police in *Walker* were documents within the sole custody and control of the state. The NCIC report of Ernest Bishop's criminal history, however, was in a public system of records and was accessible to the petitioner by other means. Therefore, even assuming that the unpublished decision in *Walker* expresses the state of the law in the Fourth Circuit,[4] it cannot be reasonably concluded that the Fourth

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[4] In another Fourth Circuit decision released less than a month before *Walker*, a different panel of the Court, on procedural grounds, declined to consider a claim that the state violated *Brady* by failing to divulge DMV records that might have been useful to the defense. The Court noted that even if it were to review the claim, "there is no merit to [a] *Brady* claim based on any failure of the attorney to turn over the DMV information which was available to the defendant in a place where a reasonable defendant would have looked." *Sanders v. Johnson*, 191 Fed.Appx. 240, 244 n.2 (4th Cir. 2006), *cert. denied*, 127 S.Ct. 2433 (2007) (citing *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990)).

Circuit has adopted a position that is contrary to the Sixth Circuit decision in this case.

B. The Fifth Circuit

Petitioner contends that the Fifth Circuit has denied a public-availability exception to *Brady* by its decision in *Johnson v. Dretke*, 394 F.3d 332 (5th Cir. 2004). In *Johnson*, the defendant was convicted and sentenced to death for the 1995 murder of a gas station attendant in Texas. An accomplice to the crime entered into a plea agreement with the state and then testified against Johnson at trial, stating that Johnson shot and killed the victim. It was later discovered that the accomplice had entered into a factual stipulation related to his own plea where he averred that he, not Johnson, was the shooter. In his federal habeas petition, Johnson argued that the prosecution violated *Brady* and knowingly permitted false testimony to be presented to the jury. *Id.* 394 F.3d at 335. The Fifth Circuit, contrary to the petitioner's current argument, did ***not*** determine whether the state had a duty to disclose the stipulation to the defendant at trial. Addressing whether the habeas petitioner was entitled to a tolling of the habeas statute of limitations, the question was whether the petitioner had procedurally defaulted his claim by failing to raise it in a timely manner. Reviewing the district court's denial of the claim as time-barred and procedurally defaulted, the Fifth Circuit noted:

> [N]either the district court nor the State considered the possible effect of a potentially viable prosecutorial misconduct claim on the question of the petition's timeliness. If Johnson demonstrates, as he will be permitted an opportunity to do, that the State should have and failed to disclose [the accomplice's] stipulation, then he might demonstrate that his petition was filed within one year of "the date on which the factual predicate of the claim . . . presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Similarly, the district court's determination that Johnson's claims are procedurally defaulted may be in error if it is determined that the failure to disclose [the accomplice's] stipulation constituted a claim not "reasonably available" at the time of the prior petition. . . . In finding procedural default, the district court relied upon the fact that [the accomplice's] stipulation was available in the public record. However, if the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial.

Id. 394 F.3d at 336-337. The Fifth Circuit in *Johnson* did not determine that a *Brady* violation had occurred, but only granted a certificate of appealability on two issues: "(1) whether the petitioner's alleged prosecutorial misconduct claims met the due diligence requirement of 28 U.S.C. § 2244(b)(2)(B)(i); and (2) if so, whether Johnson's prosecutorial misconduct

claims merit relief." *Id.* 394 F.3d at 338. The *Brady* issue was left undetermined.

Subsequently, the Fifth Circuit held that Johnson had not demonstrated due diligence in discovering the stipulation upon which his claim was based, where it was shown that Johnson was aware of the accomplice's indictment and that Johnson's counsel was present at the accomplice's plea. The Court further noted: "The transcript of that plea reflects that [the accomplice's] factual stipulation was submitted. Thus, Johnson's counsel knew or should have known that [the accomplice] was also charged with shooting [the victim] and pleaded guilty to that charge as indicted." *Johnson v. Dretke*, 442 F.3d 901, 910 (5th Cir. 2006).

Petitioner's contention is further undermined by the decision of the Fifth Circuit in *United States v. Infante*, 404 F.3d 376 (5th Cir. 2005). There, the Fifth Circuit considered whether the prosecution had violated *Brady* by failing to provide the defendant with the psychiatric evaluation of a co-conspirator in the drug trafficking case against the defendant. The Court clearly held that "*Brady* rights are not denied where the information was fully available to the defendant and his reason for not obtaining and presenting such information was his lack of reasonable diligence." *Id.*, 404 F.3d at 386 (quoting *United States v. Dean*, 722 F.2d 92, 95 (5th Cir. 1983)). *See also United States v. Valles-Zamora*, 252 Fed.Appx. 701, 703 (5th Cir. 2007), *cert. denied*, 128 S.Ct. 1455 (2008) (citing *Infante* with approval).

C. The Ninth Circuit

Petitioner implies that the Ninth Circuit has also taken a position contrary to the position of the Sixth Circuit in this case, citing the decision in *Gantt v. Roe*, 389 F.3d 908 (9th Cir. 2004). *Gantt*, however, does not support this implication.

In *Gantt*, the defendant was charged with the robbery and murder of a man where no physical evidence except a matchbook connected the defendant to the victim. The matchbook, found in the defendant's possession after the murder, was from an Indian restaurant called "Shalimar" and had, written on the inside, a telephone number to a house in Bangladesh. The state theorized that the victim had written the telephone number in the matchbook and that the defendant took the matchbook at the same time he took the victim's wallet and murdered him. Although experts opined that the handwriting in the matchbook was consistent with the victim's handwriting, no connection between the victim and the house where the telephone number connected in Bangladesh was established. As part of their investigation, police faxed a photograph of the victim to Bangladeshi authorities, who showed the photograph to the proprietor of the house. Although the proprietor could not recognize the person depicted in the photograph, he told authorities that his son, who lived in Los Angeles, worked at the Shalimar restaurant and suggested he might know the victim. Although the state disclosed the meeting of Bangladeshi authorities with the proprietor of the house and also

disclosed that the man had a son in Los Angeles, police did not divulge the failure of the proprietor to recognize the photograph of the victim or the subsequent failure of the son to recognize the face in the photograph. *See id.* 389 F.3d at 909-911. In analyzing the case, the Ninth Circuit determined that the information that neither the proprietor of the house in Bangladesh nor his son in Los Angeles recognized the victim undercut the state's theory that the matchbook was taken from the victim by the defendant. Such information should have been disclosed to the defendant in accordance with *Brady*. Even though the defense might have obtained the same information by independent investigation, the Court held that the defendant "was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation." *Id.* 389 F.3d at 911-913.

Gantt is dissimilar to the current case in that (1) the information acquired and not disclosed by the state in *Gantt* was not maintained in any public record; and (2) in *Gantt*, the state assured the defendant that it would share the fruits of its investigation. Here, the information in question was publicly available to petitioner, and the state never made any assurance to the petitioner that would have caused him not to look for it. In short, *Gantt* simply did not address the issue presented in the present case.

D. The Tenth Circuit

Finally, petitioner argues that "[t]he Tenth Circuit's precedents hew to this same rule"; he cites *United States v. Quintanilla*, 193 F.3d 1139 (10th Cir. 1999), for the proposition that "whether a defendant knew or should have known of the existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information" in the context of a *Brady* claim. *Id.* 193 F.3d at 1149.

In *Quintanilla*, the district court determined that the prosecution failed to disclose evidence acquired in a Drug Enforcement Agency (DEA) agent's interview of a co-conspirator in a drug case just three days before Quintanilla's trial. Various statements by the co-conspirator were deemed potentially exculpatory. However, the same information resulting from the interview had already been referenced in a motion for continuance filed by Quintanilla six days before trial. *Id.* 193 F.3d at 1147. Considering the prosecution's failure to turn over the DEA agent's notes of the interview to the defense under *Brady*, the Tenth Circuit reasoned:

> As we noted earlier, the evidence from [the DEA agent's] interview with [the co-conspirator] that was potentially exculpatory to defendant was known to defendant well before the interview. Defendant cited the same information six days before trial in support of her motion for a continuance. The district court is correct that whether a defendant knew or should have known of the

> existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information. *See Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995). "The only relevant inquiry is whether the information was 'exculpatory.'" *Id.* Nevertheless, a defendant's independent awareness of the exculpatory evidence is critical in determining whether a *Brady* violation has occurred. If a defendant already has a particular piece of evidence, the prosecution's disclosure of that evidence is considered cumulative, rendering the suppressed evidence immaterial. *Id.*

Id. 193 F.3d at 1149.[5] In the end, it is obvious that the Tenth Circuit does not hold the state in violation of Brady for not disclosing evidence of which the defendant is aware.

Petitioner also cites *Scott v. Mullin*, 303 F.3d 1222 (10th Cir. 2002), where the defendant, convicted of first degree murder and sentenced to death, argued that the prosecution concealed material evidence of another individual's confession to the murder of which he was convicted. *Id.* 303 F.3d at 1226. After Scott's trial, Scott's defense counsel learned of a letter in the possession of the state from another individual, Neal Rinker, suggesting that Rinker committed the murder. Additionally, it was discovered that another

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[5] *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995), is also cited by petitioner in support of his argument.

person made a statement to investigators that he had heard Rinker confess to the murder. *See id.* 303 F.3d at 1226-1227. Thus, the evidence in question in *Scott* was in the sole custody and control of the prosecution, and the defendant could not access the evidence except through the state. While the Tenth Circuit stated in *Scott* that "[i]t is not a petitioner's responsibility to uncover suppressed evidence," *id.* 303 F.3d at 1229, it has also observed that evidence is not suppressed when it is "already known by and available to [the defendant] prior to trial." *United States v. Hernandez-Muniz*, 170 F.3d 1007, 1010 (10th Cir. 1999). The holding of the Sixth Circuit in *Bell v. Bell*, 512 F.3d 223 (6th Cir. 2008), followed by the Court in this case, that "the state's failure to turn over the sentencing records of a government witness was not a *Brady* violation because those records were publicly available and the petitioner could have obtained them" (Pet.App. 5a), is not at odds with the Tenth Circuit.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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